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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

(2)

No. 85-1565

WILLIAM McCASKILL VAUGHT, JR., Petitioner,

versus,

STATE OF SOUTH CAROLINA, Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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ATTORNEYS FOR RESPONDENT.

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QUESTION PRESENTED

I.

Should this Court grant the Writ to review matter which was not properly preserved for review on appeal to the South Carolina Supreme Court?

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OPINION BELOW

The opinion of the South Carolina Supreme Court is reported in Memorandum Opinion No. 85-MO-318, filed December 30, 1985, as reproduced in Petitioner's Appendix A at pages 19.

JURISDICTION

Respondent does not question the Court's jurisdiction in this proceeding.

QUESTION PRESENTED

Should this Court grant the Writ to review matter which was not properly preserved for review on appeal to the South Carolina Supreme Court?

ARGUMENT

Petitioner pled guilty to trafficking in cocaine, with 38.22 grams on or about June 1, 1984 (Tr. p. 3, line 21-p. 4, line 1) and was sentenced to a term of imprisonment of 25 years and a fine of $50,000. (Tr. p. 1). For the first time on appeal to the South Carolina Supreme Court, Petitioner asserted that the trial judge construed Act No. 33, §2 of 1981, codified as South Carolina Code Section 44-53-370 (e) (Cum. Supp. 1983), as requiring the imposition of the maximum sentence of 25 years imprisonment and a fine of $50,000 for trafficking in 38.22 grams of cocaine pursuant

to South Carolina Code Section 44-53-370 (e) (2) (b) (Cum. Supp. 1983). Since this contention was not raised in the trial court, it could not be raised in the South Carolina Supreme Court. Matters neither presented to nor passed upon by the trial judge are waived and cannot be raised for the first time on appeal. State v. Newton, 274 S.C. 287, 262 S.E.2d 906 (1980). Moreover, when a defendant does not object to his sentence in the trial court, he may not present his objection for the first time on appeal to the South Carolina Supreme Court. State v. Shumate, 276 S.C. 46, 275 S.E.2d 288 (1981), citing, 7A West's South Carolina Digest, Criminal Law, Key No. 1042 (Supp. 1984). Petitioner's present allegation of ineffective assistance of counsel (Pet. for Writ of Cert., p. 11) was not raised before the

trial court and was not preserved for review. The South Carolina Supreme Court will not usually consider ineffective assistance of counsel as a ground for direct appeal -- particularly when, as in the present case, the issue was not argued to the trial judge. State v. Carpenter, 277 S.C. 309, 286 S.E.2d 384 (1982).

Also, Petitioner asserted for the first time on appeal to the South Carolina Supreme Court that the trial judge failed to investigate and properly determine whether Petitioner's plea was voluntary. The complaint was not properly before the South Carolina Supreme Court since Petitioner did not assert at trial that the guilty plea was of an involuntary nature. Where no timely objection is made at the plea proceeding to the knowing and voluntary

nature of the plea, such may not be raised on direct appeal to the South Carolina Supreme Court. State v. McKinney, 278 S.C. 107, 292 S.E.2d 598 (1982), citing, Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977) (rule requiring a contemporaneous objection can be applied to federal constitutional claims).

This Court should then decline to grant the Writ since the decision by the South Carolina Supreme Court rests upon adequate and independent State procedural rules. This Court has no supervisory jurisdiction over state courts. Chandler v. Florida, 449 U.S. 560, 570 (1981). Therefore, the Court will decline to review state court decisions which rest upon independent and adequate state grounds. Henry v. Mississippi, 379 U.S. 443, 446 (1964), reh. denied,

380 U.S. 926 (1965). In Michigan v. Tyler, 436 U.S. 499 (1978), the Court cited Henry v. Mississippi, supra, and stated "[f]ailure to present a federal question in conformance with state procedure constitutes an adequate and independent ground of decision barring review in this Court, so long as the State has a legitimate interest in enforcing its procedural rule." Id. at 512, n.7.

Assuming arguendo that this Court may review the present complaints, Petitioner's contentions are not supported by the Record. The trial judge and counsel for both the State and Petitioner agreed that the applicable law for the present offense was Act No. 33, §2 of 1981 since Petitioner's offense occurred prior to the effective date (June 19, 1984) of Act No. 482, §1

of 1984, codified as South Carolina Code 1976 Section 44-53-370 (e) (1985). The trial judge stated, entirely correctly, that the applicable possible sentence was "not less than seven years nor more than twenty-five years, and a fine of Fifty Thousand Dollars." Petitioner's counsel responded, "That is correct." (Tr. p. 4, line 21-p. 5, line 1). After being repeatedly advised of the sentence range and the possible maximum sentence, and conferring with his attorney, Petitioner (a college graduate [Tr. p. 3, lines 4-5]) affirmed that he wished to plead guilty. (Tr. p. 5, line 10-p. 6, line 9). At the time of the imposition of the sentence the trial judge noted that probation could not be granted until the "minimum term of imprisonment...prescribed has been served." (emphasis added) (Tr. p. 11,

lines 4-6). While the trial judge did say "I've got to sentence him to the maximum...." (Tr. p. 11, lines 10-11), within the context of the whole Record this statement could only be reasonably understood to indicate an exercise of the trial judge's discretion in imposing the maximum sentence. Petitioner's attempt to isolate one small portion of the plea proceeding, assert that the trial judge thought that he was required to impose the maximum sentence, and thereby assign error is without merit since it is unsupported by the Record. It is inescapable that the trial judge knew the sentence range and chose, in his sound discretion, to impose the maximum sentence.

The bases for Petitioner's argument are hindsight (in that Petitioner received the maximum sentence) and pure

speculation as to whether Petitioner understood the nature of his plea. In fact, the Record demonstrates that the trial judge fully canvassed the matter of the guilty plea on the Record with Petitioner so as to insure that the guilty plea was voluntarily and understandingly made, and the Record itself reveals Petitioner's awareness of the consequences of his guilty plea. This is all that was required. LoPiano v. State, 270 S.C. 563, 243 S.E.2d 448 (1978); State v. Lambert, 266 S.C. 574, 225 S.E.2d 340 (1976); Vickery v. State, 258 S.C. 33, 186 S.E.2d 827 (1972).

Prior to accepting the guilty plea, the trial judge questioned Petitioner extensively regarding his understanding of the plea. The Record reflects that Petitioner:

(1) was represented by counsel and was satisfied with counsel;

(2) was advised by counsel of his constitutional rights;

(3) was 34 years old and a college graduate;

(4) understood that he had a right to trial by jury;

(5) had not been promised anything or threatened
in any manner;

(6) was pleading guilty of his own free will;

(7) was pleading guilty because he was guilty of trafficking with 38.22 grams of cocaine on or about June 1, 1984;

(8) understood the sentence range and maximum sentence. (Tr. pp. 2-6, line 12).

Also, prior to imposition of sentence the Record demonstrates that Petitioner:

(1) had previous drug-related legal problems;

(2) in the present case had obtained cocaine by way of attempted subterfuge from two continents;

(3) claimed to be a drug user not a drug dealer but offered no explanation of how he otherwise supported himself;

(4) had been out of jail and receiving medical treatment;

(5) had his sister with him in the courtroom. (Tr. pp. 7-11).

While Petitioner attempts through one of his many complaints to argue that his medical treatments and alleged drug dependency prevented him from voluntarily pleading, this is pure speculation. Petitioner's doctor (Tr. p. 8, lines

12-19), attorney, and sister all knew that Petitioner was appearing in court and facing imprisonment. All of these people communicated with the court either in person or by "note." If Petitioner was under the influence of drugs, it is beyond question that one of these people would have brought the matter to the court's attention. There was nothing in Petitioner's request for a recommendation for his drug treatment on October 4, 1984 so important that it had merited Petitioner's own attention and dedication since his 1981 civil penalty for cocaine in Miami in 1981. (Tr. p. 9, lines 4-10).

In Wade v. Coiner, 468 F.2d 1059 (4th Cir. 1972), the Fourth Circuit Court of Appeals considered whether a defendant was denied due process of law in state court by the acceptance of a

guilty plea without a specific determination as to whether the defendant "understood the nature of the charge and the relation of the law to the acts he committed and the consequences of his plea, i.e., the waiver of several constitutional rights?" The Fourth Circuit found that neither the Constitution, Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969), nor Rule 11 of the Federal Rules of Criminal Procedure required a state judge to specifically admonish a defendant as to the constitutional rights waived by the entry of a guilty plea. The Court held that while a defendant "must have been 'fully aware of the direct consequences' [Brady v. United States, 397 U.S. 742, 755, 90 S.Ct. 1463, 25 L.Ed.2d 747, 760 (1970)] of his plea...[i]f the record affirmatively

shows that the plea was intelligently and voluntarily entered, that it enough." Wade v. Coiner, 468 F.2d at 1060. Henderson v. Morgan, 426 U.S. 637, 96 S.Ct. 2253, 49 L.Ed.2d 108 (1976) stands for the proposition that when a defendant pleads guilty, he must have adequate notice of the crime charged. But, even in the absence of an express representation that the nature of the offense has been explained to the accused, "it may be appropriate to presume that in most cases defense counsel routinely explain the nature of the offense in sufficient detail to give the accused notice of what he is being asked to admit." Henderson v. Morgan, 426 U.S. at 647, 49 L.Ed.2d at 115-116.

The totality of the circumstances in the Record supports the trial judge's determination that Petitioner's plea was

voluntarily entered. (Tr. p. 6, lines 10-12). The Writ should not be granted since (1) Petitioner did not preserve constitutional issues for review on direct appeal to the South Carolina Supreme Court, (2) Petitioner may pursue his contention of ineffective assistance of counsel in State post-conviction relief proceedings, and (3) there was neither prejudice to nor violation of Petitioner's constitutional rights by the voluntary entry of his guilty plea.

CONCLUSION

For the foregoing reasons, Respondent submits that Petitioner's Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT.